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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KEVIN SEAN SMITH,

Plaintiff and Appellant,

v.

BANK OF AMERICA,

Defendant and Respondent.

_____/

A124879

(City & County of San Francisco Super. Ct. No. CGC08474006)

Appellant Kevin Sean Smith filed a civil complaint against his former employer respondent Bank of America (the Bank) alleging discrimination under the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12940.) The Bank moved for summary judgment arguing it was entitled to prevail, as a matter of law, because appellant was one of its officers, and under controlling federal law, it was entitled to dismiss its officers at any time. The trial court agreed with the Bank and granted it summary judgment. Appellant now appeals contending the trial court applied the controlling law incorrectly. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was hired by the Bank as a premier client manager (PCM) on October 1, 2003. The job of a PCM is to be the single point of contact between the Bank and its premier banking clients, who were defined as clients with at least $250,000 worth of business with the Bank. Appellant was required to take care of his client's needs by

reviewing their portfolios, suggesting ways they could gain more value from their relationship with the Bank, and referring customers to other business partners within the Bank.

Appellant apparently performed his work well. On April 26, 2005, the Bank's board of directors appointed him to the position of assistant vice-president (AVP). As an AVP, appellant had the authority to sign, and verify written instruments such as contracts, checks, mortgages, and loan documents. Appellant also had the authority to approve check deposits of up to $5 million without a hold, to waive penalties on overdrafts up to $25,000, and to offer provisional, immediate credit to clients up to $10,000.

At some point in 2005, appellant began to experience personal problems that compromised his ability to work. He sought psychiatric help and eventually was diagnosed as having depression and post traumatic stress disorder. In January 2006, appellant notified his supervisor that the problems he was experiencing interfered with his ability to do his job. Appellant requested and the Bank granted him a leave of absence on February 15, 2006.

Appellant received short-term disability benefits from the state and then long-term disability payments from a private insurer. In January 2007, the private carrier informed appellant that he was no longer entitled to benefits.

Appellant's doctor told him he was cleared to return to work with restrictions on February 1, 2007. On January 19, 2007, appellant informed his supervisor that he could return to work but that he could not perform the duties of a PCM.

On appellant's first day back at work, he gave the Bank a note from his doctor that stated he needed an accommodation for "optimal functioning." The note went on to state, "The accommodation that is needed is that engagement with the public should not be an essential requirement for [appellant's] work position."

The Bank asked for clarification about what restrictions appellant needed. In response, appellant provided a second note from his doctor that stated his "restrictions involve his inability to cope with people engaging in hostile behaviors, such as being verbally abusive, threatening, condescending, belittling, domineering, or expressing

malicious intent." The noted stated that appellant "should be limited to a work environment where potential exposure to these above described triggers is not required."

When appellant returned to work, the Bank assigned him an accommodations case manager to facilitate his search for a vacant position that would suit his needs. The Bank told appellant he would be given a 60-day job search period, 30 days of which would be paid. Appellant worked with the accommodations case manager and applied for several positions that were open with the Bank. He was not hired for any of them. On May 11, 2007, at the end of the 60-day job search, the Bank terminated appellant. The Bank's board of directors ratified the termination at a regularly scheduled meeting on August 14, 2007.

On April 8, 2008, appellant filed the complaint that is at issue in the current appeal. It named the Bank as defendant and alleged five causes of action under FEHA (1) disability discrimination (Gov. Code, § 12940, subd. (a)), (2) failure to provide reasonable accommodation (Gov. Code, § 12940, subd. (m)), (3) failure to engage in the interactive process (Gov. Code, § 12940, subd. (n)), (4) failure to prevent disability discrimination (Gov. Code, § 12940, subd. (k)), and (5) violation of the public policy set forth in Government Code section 12940.

After what appears to have been extensive discovery, the Bank moved for summary judgment arguing it was entitled to prevail, as a matter of law, because appellant was an officer of the Bank, and as an officer, it was entitled under 12 United States Code section 24, paragraph Fifth, to terminate him at any time. The Bank argued that all the causes of action appellant had alleged were preempted by the controlling federal law. Alternately, the Bank argued it was entitled to prevail on each of the causes of action alleged on substantive grounds.

The trial court conducted a hearing on the Bank's motion and granted it summary judgment ruling that 12 United States Code section 24 applied and the causes of action appellant alleged were preempted. Having reached that conclusion, the court did not address the substantive arguments the Bank had advanced.

After the court entered judgment in favor of the Bank, appellant filed this appeal.

II. DISCUSSION

Appellant contends the trial court erred when it granted the Bank summary judgment. The standard of review we apply is familiar. A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of a cause of action or that it has a complete defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence that shows there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) There is a triable issue if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of plaintiff. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. [Citation.]" (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.) On appeal, we review a summary judgment ruling de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

With this background, we turn to the specific arguments advanced.

The National Bank Act (NBA) gives a national banking association the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, *and other officers*, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." (12 U.S.C. § 24 (Fifth), italics added.)

The trial court found that the Bank is a national banking association within the meaning of 12 United States Code section 24, that appellant was an "officer" within the meaning of the statute, and that as an officer, the Bank had the power to dismiss appellant at any time. Therefore, the court ruled that all of the causes of action appellant alleged were preempted.

Appellant does not dispute that the Bank is a national banking association within the meaning of 12 United States Code section 24, paragraph Fifth, nor does he dispute that *if* the statute applied, the causes of action he alleged would be preempted.

Appellant's argument on appeal is that he was not an "officer" within the meaning of the statute.

Our Supreme Court addressed the question of when a bank employee qualifies as an "officer" within the meaning of the NBA in *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082. After analyzing the language of the statute and its history, the court ruled that an officer possesses the following attributes: "*First*, he or she holds an office created by the board of directors and listed in the bank's bylaws. [Citation.] *Second*, he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws. [Citations.] *Third*, he or she has the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf. [Citation.] *Fourth*, his or her decisionmaking authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect potentially the public's trust in the banking institution. [Citations.] If a particular bank employee holds a position possessing these features, he or she may be viewed as the bank itself in the eyes of third parties. Such an employee is an 'officer' and serves at the pleasure of the board of directors." (*Id.* at p. 1091, orginal italics.)

Here, appellant does not dispute that the first and second elements of the test set forth in the *Wells Fargo Bank* case were satisfied. And while appellant does not expressly concede that the evidence presented on summary judgment was sufficient to satisfy the fourth element, he does not present any argument on that point either. Thus this case turns on the third factor: whether appellant had the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf. To answer that question, we turn again to our Supreme Courts decision in *Wells Fargo Bank v. Superior Court*, *supra*, 53 Cal.3d 1082. One of the issues in that case was whether three bank vice-presidents had the authority to bind the bank within the meaning of the four-part test that the court had articulated. The court ruled the vice-presidents did have that authority explaining its decision as follows: "there is no dispute they had the authority to

deal with third parties and bind the bank in third party transactions by executing contracts and instruments. For example, the record reveals plaintiffs could commit the bank to unsecured loans in the form of overdrafts in specified amounts ranging from $10,000 to $250,000." (*Id.* at p. 1091.)

The Bank presented similar evidence here. The evidence demonstrated that appellant had the authority to bind the Bank by signing written instruments such as contracts, checks, mortgages, and loan documents. Furthermore, appellant had the authority to approve check deposits of up to $5 million without a hold, thereby making those funds immediately available to a customer before the Bank has received the funds from the check writer's account. Arguably, this authority gave appellant even more power to bind the Bank than was found to be sufficient in *Wells Fargo Bank.* On this record, we do not hesitate to conclude that appellant had the authority to bind the Bank.

None of the arguments appellant presents convince us the trial court ruled incorrectly.

Appellant contends the Bank admitted during discovery that it had no facts to support the conclusion that he exercised "officer duties." However, the evidence appellant cites does not support his argument. Appellant relies primarily on an answer that the Bank provided in response to one of his form interrogatories.[1] However, the answer in question did not address what evidence the Bank might possess that would

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[1] The Bank's answer stated as follows:

"Plaintiff was hired by the Bank on October 1, 2003 and worked as Premier Client Manager ('PCM') assigned to the San Francisco Peninsula Banking Group. PCMs, such as Plaintiff, are assigned a book of approximately 300 customers when they start. The customers are people who already have the assets that qualify them for the Premier Banking Program. The PCMs are expected to call these people, and to take care of their banking needs. The customers are people who already have a relationship with the Bank. Thus, the PCMs do not have to do cold-calling but instead are responsible for developing the banking relationship with the customers. The job is essentially a sales job. In addition to taking care of customer requests, the PCMs profile customers for financial goals and objectives, and come up with product recommendations.

"Plaintiff worked as a PCM with the above responsibilities until he went out on leave on February 15, 2006. He was on leave until February 1, 2007."

support the conclusion that he acted as an officer. The answer was in response to the totally different question of what evidence the Bank possessed that would support its affirmative defenses that appellant's disability could not be accommodated without undue hardship and that the Bank had acted for legitimate business reasons. Appellant has simply mischaracterized the Bank's answer.

Similarly, appellant contends the Bank admitted in discovery that it characterized him as an officer based on his title alone. He cites the following passage from the Bank's discovery response: "[Plaintiff's] job duties did not make him an officer of the Bank because job duties do not make a person an officer of any national bank. Plaintiff was an officer of the Bank because he was appointed by the Bank's Board of Directors as an officer holding the title of Assistant Vice President. The title Assistant Vice President was authorized by the Bank's Bylaws and Board of Directors." However, appellant has set forth only part of the Bank's answer. Immediately after the passage appellant quotes, the Bank's answer continues: "Plaintiff also had the requisite level of authority which was authorized by the Bank's Bylaws and Board of Directors." Thus, when the Bank's *entire* answer is read, it is clear that the Bank was not claiming appellant was an officer based on his title alone.[2]

Our conclusion on this issue leads to another of appellant's arguments. Appellant contends this case is controlled by *Ramanathan v. Bank of America* (2007) 155 Cal.App.4th 1017. However, the issue in that case was whether a employee who held the position of vice-president *automatically* satisfies the four part *Wells Fargo Bank* test without further analysis. (*Id.* at p. 1030.) The *Ramanathan* court ruled that title alone was not sufficient and that the employee's actual situation must be analyzed. (*Ibid.*) Here, as the Bank's discovery response indicates, the Bank did not rely on appellant's title alone to support the conclusion that 12 United States Code section 24 applied.

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[2] There is a clear line between appropriately aggressive advocacy and a willful attempt to mislead the court. Appellant's arguments on this point come perilously close to the latter.

Rather, the Bank presented *evidence* that demonstrated appellant had the requisite level of authority that is set forth in the *Wells Fargo Bank* test.

Next, appellant seems to argue the trial court should not have granted summary judgment because a triable issue of fact was present as to whether he was truly an officer of the bank. Appellant's argument on this point is procedurally defective because all he does is cite several pages of deposition testimony and a two-page declaration that he submitted. Appellant has not even attempted to discuss how that evidence supports the conclusion that a triable issue of fact was present. We are not obligated to develop appellant's argument for him. (*Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.)

Finally, appellant argues 12 United States Code section 24 does not apply because he was not an active officer when he was terminated by the Bank. According to appellant, he ceased being an active officer when he went on leave in February 2006. Appellant had not cited any authority that holds a national bank's authority to terminate only applies to officers who are active and the cases he does cite do not so hold. Appellant bases his argument on language from *Westervelt v. Mohrenstecher* (8th Cir. 1896) 76 Fed. 118, 122, where, over a century ago, the court described the purpose of what is now set forth in 12 United States Code section 24: "Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the *active officers*, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success — to

the very existence — of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision . . . was inserted, ex industria, to provide for this very contingency." (Italics added; see also *Peatros v. Bank of America* (2000) 22 Cal.4th 147, 160-161.)

While the *Westervelt* court did use the term "active officers" when describing the purpose of what is now contained in 12 United States Code section 24, the court did not hold or suggest that the statute applies only to active officers. Cases are not authority for propositions that are not considered. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) Furthermore, the rule appellant proposes simply would not make sense. It certainly would not be unusual for a bank to place an officer who is accused of wrongdoing on leave pending the bank's investigation of the truth of the allegation. If a bank's ability to terminate is limited to officers who are "active," the bank would then be *precluded* from terminating the officer if it determined ultimately that he acted improperly. That would be absurd. We decline to adopt an absurd reading of the statute. (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567.)

We conclude the trial court correctly granted the Bank summary judgment on preemption grounds.[3]

[3] Having reached this conclusion, we need not decide whether respondent also was entitled to summary judgment on substantive grounds as to the specific causes of action appellant alleged.

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.